

United States
Circuit Court of Appeals
For the Ninth Circuit

UNIVERSAL AUTOMOBILE INSURANCE
COMPANY, a corporation,

Appellant

vs.

FRANK NOEL,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Eastern District of Washington,
Southern Division.

FILED

DEC 21 1932

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
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SNIVELY & BOUNDS,

Ward Building, Yakima, Washington,
Attorneys for Appellant.

D. V. MORTHLAND,

Miller Building, Yakima, Washington,
Attorney for Appellee.

In the Superior Court of the State of Washington
in and for Yakima County.

No. 25,131

State of Washington,
County of Yakima.—ss.

FRANK NOEL,

Plaintiff,

vs.

UNIVERSAL AUTOMOBILE INSURANCE
COMPANY, a stock corporation,
Defendant.

SUMMONS.

The State of Washington to the said Universal Au-
tomobile Insurance Company, a stock corpora-
tion. Defendant:

You are hereby summoned and required to be
and appear within twenty (20) days after the ser-

vice of this Summons upon you, exclusive of the day of service if served within the State of Washington, or within sixty (60) days after service of this summons upon you, exclusive of the day of service, if served out of the State of Washington, and answer the complaint and serve a copy of your answer upon the undersigned attorney at the place below specified and defend the above entitled action in the Court aforesaid; and in case of your failure so to do judgment will be rendered against you, according to the demand of the complaint, a copy of which is herewith served upon you (or which will be filed with the Clerk of said Court within five (5) days after service of this Summons upon you).

SNIVELY & BOUNDS,
Attorneys for Plaintiff.

Office and Postoffice Address:

Ward Building,
101½ E. Yakima Ave.,
Yakima, Washington. [1]*

*Page numbering appearing at the foot of page of original certified Transcript of Record.

In the Superior Court of the State of Washington
in and for Yakima County.

No. 25,131

FRANK NOEL,

Plaintiff,

vs.

UNIVERSAL AUTOMOBILE INSURANCE
COMPANY, a stock corporation,

Defendant.

COMPLAINT.

The plaintiff complains of the defendant and alleges:

1.

That the defendant company designates itself and is known as the Universal Automobile Insurance Company, and is further designated and known as a stock corporation, with its principal office in Dallas, Texas; and at all times mentioned in this complaint, the defendant was authorized to and is doing business in the State of Washington.

2.

That on June 1, 1931, the defendant company issued to one John Noel, its three certain insurance policies, being known as policies number A. X. 463254; number A. X. 463255; number A. X. 463256, respectively. Said policies so issued, insured three trucks of the said Noel for the principal sum of \$4000.00, respectively, said trucks

4 *Universal Automobile Insurance Company*

being what is known as White five ton trucks, respectively. The terms and conditions of said policies are more fully set out in the said respective policies which are marked plaintiff's Exhibits "A", "B" and "C", respectively.

3.

That on or about the 26th day of June, 1931, each of the said three trucks described and covered by the said three policies, respectively, while the said trucks were stopped on what is known as the North Fork of the John-Day Highway, and sometimes known as the John-Day Grade, Umatilla [2] County, Oregon, and at a point on said grade or highway that was very steep, got out of control and went over the bank and upset and rolled to the bottom which was considerable distance, therein and thereby completely wrecking and rendering the said trucks and each of them useless and valueless, to the damage of the assured and now of the assured's assignee in the principal sum under each of the policies of \$4000.00, to wit: \$12000.00, total sum under the three policies, for the loss of the said three trucks.

4.

That the assured, John Noel, timely and in compliance with the said policies, gave notice to the defendant company and to its agents, of the said loss, and that said defendant company acting through its duly authorized agents, on or about the

12th day of August, 1931, denied liability under the said policies and each of them.

5.

That on the 9th day of September, 1931, the assured, John Noel, in writing, duly and regularly assigned all of his right title and interest in and to the said three policies and in and to any recovery of the same to one Frank Noel, and that the said Frank Noel is now and has been, since the 9th day of September, 1931, the beneficiary under each of the said three policies. That said written assignment is marked, plaintiff's Exhibit "D".

WHEREFORE, plaintiff prays that he have judgment against the defendant for the sum of \$12000.00, being the total limit of liability under the three policies, respectively, and for interest on said sum from the 26th day of June, 1931 together with his costs and disbursements incurred in the preparation and trial of this action.

SNIVELY & BOUNDS,
Attorneys for Plaintiff. [3]

VERIFICATION.

State of Washington,
County of Yakima.—ss.

This day personally appeared before me, the undersigned, Notary Public in and for said County and State Frank Noel, who, having first being duly

sworn by me, upon oath deposes and says: That he is the plaintiff named in the foregoing Summons and Complaint, that he has heard the same read over, knows the contents thereof and that the same are true as he verily believes.

FRANK NOEL.

Subscribed and sworn to before me this 10th day of September, A. D. 1931.

[Seal] I. J. BOUNDS,
Notary Public in and for the State of Wash-
ington, residing at Yakima, Washington.

Service accepted and copy received of the with-
in this day of 193...

.....,
Attorney for.....

[Endorsed]: Filed Sept. 10, 1931. Thomas
Granger, County Clerk. [4]

[Title of Court and Cause.]

PETITION FOR REMOVAL TO THE UNITED
STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION.

Comes now the defendant and appearing specially
in the above entitled action, files this, its petition
for removal of the above cause to the United States
District Court for the Eastern District of Wash-
ington, Southern Division, and on that behalf al-
leges:

1.

That the defendant, Universal Automobile Insurance Company, is a corporation organized under the laws of Texas, with its principal office and place of business at Dallas, Texas; that it is a citizen of the State of Texas, but is authorized to transact an insurance business in the State of Washington.

2.

That the plaintiff, Frank Noel, is a resident and citizen of Yakima County, Washington, the same being within the jurisdiction of the United States District Court for the Eastern District of Washington, Southern Division. That he has duly commenced in the above entitled Superior Court an action against the defendant.

3.

That there exists between the parties to the above suit a controversy involving more than \$3,000.00, to wit, [5] as shown by the complaint in said action the said controversy involves the sum of \$12,000.00, and that defendant has a meritorious defense thereto.

4.

That the diversity in the citizenship between the plaintiff and defendant corporation existed at the time of the commencement of the above entitled action and still exists and that the controversy above

mentioned involved more than \$3,000.00 at the time of the commencement of said action and still involves more than said sum as hereinbefore stated.

5.

That notice of the filing of this petition for removal of said cause to the United States District Court as aforesaid has been duly given in the manner provided by law.

6.

That a bond conditioned as provided by law, has been filed with this petition.

WHEREFORE, petitioner prays that the Court make and enter an order herein removing the said cause from the Superior Court of Yakima County, Washington, to the United States District Court for the Eastern District of Washington, Southern Division, and that the clerk of the above entitled Court be ordered to transfer all of the files and proceedings in said action to the clerk of the United States District Court for the Eastern District of Washington, Southern Division, at Yakima, Washington, and that the Court enter such other and further orders herein as shall be necessary and proper to effect the said removal.

D. V. MORTHLAND,
Attorney for Defendant. [6]

State of Washington,
County of Yakima.—ss.

D. V. Morthland, being first duly sworn, on oath deposes and says:

That he is the attorney of record for the defendant above named; that he is authorized to make application for the removal of the above entitled cause to the United States District Court for the Eastern District of Washington, Southern Division, and is authorized to verify the foregoing petition; that he has read over the foregoing petition, knows the contents thereof and that same are true to the best of his knowledge and belief.

D. V. MORTHLAND.

Subscribed and sworn to before me this 28th day of September, 1931.

[Seal]

MILDRED DIXON,

Notary Public for Washington residing at
Yakima, Washington.

[Endorsed]: Filed Sept. 28, 1931. Thomas
Granger, County Clerk. [7]

BOND FOR REMOVAL. #25131

KNOW ALL MEN BY THESE PRESENTS, That the CONSOLIDATED INDEMNITY AND INSURANCE COMPANY, a corporation under the laws of the State of New York, having an office and principal place of business at No. 475 Fifth Avenue, Borough of Manhattan, in the City of New York and State of New York, is held and firmly bound unto FRANK NOEL in the penal sum of five hundred (\$500) dollars, for the payment whereof well and truly to be made unto the said FRANK NOEL, heirs, executors, administrators, successors and assigns, the said CONSOLIDATED INDEMNITY AND INSURANCE COMPANY binds itself, its successors and assigns, firmly by these presents.

UPON THESE CONDITIONS: the said UNIVERSAL AUTOMOBILE INSURANCE COMPANY, a stock corporation being about to petition the Superior Court of the State of Washington, held in and for the County of Yakima for the removal of a certain cause therein pending, wherein the said FRANK NOEL plaintiff and the said UNIVERSAL AUTOMOBILE INSURANCE COMPANY, a stock corporation defendant, to the District Court of the United States, for the Eastern District of Washington.

Now, if the said UNIVERSAL AUTOMOBILE INSURANCE COMPANY, a stock corporation shall enter in such District Court of the United

States, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and shall well and truly pay all costs that may be awarded by the said District Court of the United States if said District Court shall hold that such suit was wrongfully or improperly removed there-to, and also shall appear and enter special bail in such suit if special bail was originally requisite therein, then this obligation to be void, otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, the said CONSOLIDATED INDEMNITY [8] AND INSURANCE COMPANY has caused its corporate seal to be hereto affixed, and these presents to be signed by its duly authorized officers, on the 26th day of September, 1931.

[Seal] CONSOLIDATED INDEMNITY
AND INSURANCE COMPANY,
By ROBERT E. TENNEY,
Attorney in Fact.

Attest:

KAY G. SEIBIRD.

[Endorsed]: Filed Sept. 28, 1931. Thomas Granger, County Clerk. [8½]

[Title of Court and Cause.]

NOTICE.

To the above named plaintiff, Frank Noel and to Snively & Bounds, his attorneys:

You, and each of you, will please take notice that the above named defendant has caused to be filed in the above Court a petition for the removal of said cause to the United States District Court for the Eastern District of Washington, Southern Division, and that same will be presented to one of the Judges of the above Court, together with the bond as provided by law, on Thursday, the 1st day of October, 1931, at the hour of 1:30 o'clock P. M. or as soon thereafter as counsel may be heard.

Dated at Yakima, Washington, this 28th day of September, 1931.

D. V. MORTHLAND,
Attorney for Defendant.

Service of the within and foregoing notice, together with a copy of the Petition for removal of the cause and copy of bond received this 28th day of September, 1931.

SNIVELY & BOUNDS,
Attorneys for Plaintiff.

[Endorsed]: Filed September 28, 1931. Thomas Granger, County Clerk. [9]

[Title of Court and Cause.]

ORDER FOR REMOVAL TO THE UNITED STATES DISTRICT COURT.

The above entitled cause coming on regularly before the Court upon the petition of the defendant for an order removing the said cause from the Superior Court of the State of Washington, in and for Yakima County, to the United States District Court for the Eastern District of Washington, Southern Division, and it appearing to the Court that a diversity of citizenship exists between the parties to said action; that the amount in controversy is more than \$3,000.00, and that the defendant has duly filed its petition for such removal and therewith a bond as provided by the statutes of the United States in such cases, and that said defendant is entitled to the removal of said cause to the said United States Court, the said bond being conditioned upon such removal within the period of thirty days after the date hereof, and the Court being fully advised in the premises, notice of said petition and bond having been duly given,

IT IS NOW HEREBY ORDERED AND ADJUDGED that the above entitled cause be, and the same hereby is removed to the United States District Court, for the Eastern District of Washington, Southern Division, and that the Clerk of this Court properly prepare the files and proceedings hereof [10] and cause same to be filed in the office of the Clerk of said United States District Court,

for the Eastern District of Washington, Southern Division, at the cost and expense of said defendant.

DONE IN OPEN COURT this 1st day of October, 1931.

DOLPH BARNETT,
Judge.

[Endorsed]: Filed for record, Oct. 1, 1931, and recorded in Vol. 34 of Sup. C. J. page 217. Thomas Granger, County Clerk. [11]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

FRANK NOEL,

Plaintiff,

vs.

UNIVERSAL AUTOMOBILE INSURANCE
COMPANY, a stock corporation,
Defendant.

NOTICE OF REMOVAL TO FEDERAL
COURT.

To the above named plaintiff, Frank Noel, and to Snively & Bounds, his attorneys:

You, and each of you, will please take notice that pursuant to an order of the Superior Court in and for Yakima County, Washington, entered October 1st, 1931, the files in the action entitled: "In the Superior Court of the State of Washington, in and

for Yakima County, Frank Noel, Plaintiff, v. Universal Automobile Insurance Company, a stock corporation, Defendant," have been transferred to and filed in the office of the Clerk of the United States District Court for the Eastern District of Washington, Southern Division, at Yakima, Washington.

Dated at Yakima, Washington, this 21st day of October, 1931.

D. V. MORTHLAND,
Attorney for Defendant.

Service accepted and copy received this 22nd day of October, 1931.

SNIVELY & BOUNDS,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 23, 1931. W. S. Coey,
Clerk. [12]

[Title of Court and Cause.]

AMENDED ANSWER.

Leave of Court therefor having been first obtained, the defendant in the above entitled action hereby files its amended answer, and in that behalf admits, denies and alleges:

1.

Admits the allegations contained in paragraphs 1 and 2 of plaintiff's complaint.

2.

Denies each and every allegation, matter and thing contained in paragraphs 3 and 4 of said complaint, except as same or any thereof may be hereinafter alleged, admitted or explained.

3.

For want of information upon which to form a belief the defendant denies the allegations contained in paragraph 5 of said complaint.

Further answering said complaint and by way of a first affirmative defense thereto, the defendant alleges:

1.

That on or about June 1st, 1931, through its office in Spokane, Washington, upon the application of John Noel, and [13] upon representations made to the defendant by said John Noel, and/or his duly authorized agent or agents as hereinafter more fully set forth, the defendant issued in the name of said John Noel, the three policies of indemnity insurance described in plaintiff's complaint, attached thereto and marked Exhibits A, B, and C therein.

That a material stipulation of the insurance contracts evidenced by each of said policies is contained in paragraph 2 under statement of conditions and agreements "F" as follows:

"F." Unless otherwise provided by agreement in writing added hereto, the Company shall not be liable; * * *

(2) Under Section 2 nor under Item 4 of Section 1 of the Schedule of Perils, for any loss, damage, or expense while the automobile insured hereunder is operated, maintained, or used * * * (c) for towing or propelling any trailer or vehicle (incidental assistance to a stranded automobile on the road is permitted).”

That no agreement, either oral or in writing, permitting the towing and/or propelling of any trailer or vehicle by said trucks or either of them was ever made, added to and/or attached to the said policies or either thereof.

3.

That said John Noel, the assured named in said policies, on or about June 26th, 1931, was operating the trucks described in said policies upon a certain road in Umatilla County, Oregon, known as the North Fork of the John Day Highway. That said road at the place hereinafter mentioned was on a steep grade and that in operating said trucks the said John Noel caused each and all thereof to be fastened together by cables or chains and the said trucks so fastened, chained or cabled together were in turn chained or fastened by cable to another vehicle then being towed by the said trucks along the said highway and upon the said grade, to-wit, a [14] steam shovel; that is to say, the first or lead truck was engaged in towing the other two trucks and the steam shovel, and each of the other

trucks in turn was towing the truck behind it and the said steam shovel.

4.

That while said assured was so engaged in towing the said trucks and steam shovel, the said trucks for some cause and in some manner unknown to the defendant, and while so chained or fastened together, went over the outside of said road and over the edge thereof, and that all of said trucks, together with said steam shovel being so towed, rolled down the hill or grade off and below the said highway and were damaged. That the effective cause of said damage was the towing of said trucks and steam shovel contrary to the terms and conditions of said insurance contracts and not otherwise.

That for a second affirmative defense the defendant alleges:

1.

The defendants incorporate herein by this reference each, every and all of the allegations contained in its first affirmative defense.

2.

That in said policy of insurance numbered AX 463254, statement 11 thereof is as follows:

“Statement 11. The automobile described herein is paid for in full and is not mortgaged, except in the amount of \$740.00, which

is payable in monthly installments, subject to the terms, conditions, limitations and agreements of this policy, if any, under section 1 of the Schedule of Perils is made payable to Auto Loan Company of Yakima, Wash., as their interest may appear.”

3.

That the above statement was made by said John Noel to the defendant as an inducement for the issuance of said insurance policy and said statement written into said policy [15] being the representation made by him to the defendant upon inquiry by the defendant as to the conditions of the title to said property insured as to whether or not same was mortgaged.

4.

That in truth and in fact the truck described in said policy, to-wit, a 1928 White 5 ton truck, S.#138992, M.#5687, was not only mortgaged to the Yakima Auto Loan Company for the sum of \$740.00, but at the time of the issuance of said policy was also mortgaged by chattel mortgage to Frank Noel for the sum of \$8056.94, the said mortgage being dated January 3rd, 1929, and filed in the office of the County Auditor of Yakima County, Washington, on January 3rd, 1929, and being in force and unreleased and unsatisfied in the office of the County Auditor of Yakima County, Washington, from the date of the filing thereof, to-wit,

January 3rd, 1929, until after the damage to said truck hereinbefore described, which occurred on June 26th, 1931, and that said mortgage was also recorded on September 11th, 1929, at page 86 of Book 58, Records of Chattel Mortgages of Umatilla County, Oregon, and remained unreleased and unsatisfied on the records of said Umatilla County, Oregon, at all times from the date of recording thereof until after the damage which resulted to said truck on June 26th, 1931.

5.

That the truth of said statement 11 so made in the application of said John Noel for the policy issued thereon, was material to the issuance of said policy and without which the said policy would not have been issued, and that if the said John Noel had disclosed to the defendant the fact that the said property was also mortgaged to Frank Noel in the sum hereinbefore set forth or at all, the said policy would not [16] have been issued to said assured, and that by reason of said misrepresentation on the part of said John Noel as to the condition of the title to said property, the defendant was deceived and was thereby fraudulently induced to issue said policy under conditions which affected the moral hazard thereof. That the defendant is advised and believes, and therefore alleges the fact to be that said John Noel made the false representation as to the condition of the title to said property with the intention to deceive the

defendant and to mislead it in the issuance of said policy of insurance AX #463254. That by the acceptance of said policy with said statement 11 contained therein as hereinbefore set forth said John Noel ratified and confirmed the said false representations so made by him or in his behalf in applying for said policy.

By way of a third affirmative defense to the plaintiff's complaint, the defendant alleges:

1.

The defendant incorporates herein by this reference all of the allegations, matters and things contained in its first affirmative defense.

2.

That in said policy of insurance AX #463255, statement 11 thereof is as follows:

“Statement 11. The automobile described herein is paid for in full and is not mortgaged, except in the amount of (no exceptions), which is payable....., subject to the terms, conditions, limitations and agreements of this policy, if any, under section 1 of the Schedule of Perils is made payable to.....as..... interest may appear.”

3.

That the above statement was made in the application by said John Noel for the issuance of said insurance policy and was a representation made by

him to the defendant upon [17] inquiry by the defendant as to the conditions of the title to said property insured as to whether or not same was mortgaged.

4.

That in truth and in fact the truck described in said policy, to-wit, a 1928 White 5 ton truck, S.#144846, M#9381, was mortgaged by chattel mortgage to Frank Noel for the sum of \$8056.94, the said mortgage being dated January 3rd, 1929, and filed in the office of the County Auditor of Yakima County, Washington, on January 3rd, 1929, and being in full force and unreleased and unsatisfied in the office of the County Auditor of Yakima County, Washington, from the date of the filing thereof, to-wit, January 3rd, 1929, until after the damage to said truck hereinbefore described, which occurred on June 26th, 1931, and that said mortgage was also recorded on September 11th, 1929, at page 86 of Book 58, Records of Chattel Mortgages of Umatilla County, Oregon, and remained unreleased and unsatisfied on the records of said Umatilla County, Oregon, at all times from the date of recording thereof until after the damage which resulted to said truck on June 26th, 1931.

5.

That the truth of said statement 11 so made in the application of said John Noel for the policy issued thereon, was material to the issuance of said

policy and without which said policy would not have been issued, and that if the said John Noel had disclosed to the defendant the fact that said property was mortgaged to Frank Noel in the sum hereinbefore set forth or at all, the said policy would not have been issued to said assured, and that by reason of said misrepresentations on the part of said John Noel as to the conditions of the title to said property, the defendant was deceived and was thereby fraudulently induced to issue said [18] policy under conditions which affected the moral hazard thereof. That the defendant is advised and believes, and therefore alleges the fact to be that said John Noel made the false representation as to the condition of the title to said property with the intention to deceive the defendant and to mislead it in the issuance of said policy of insurance AX#463255. That by the acceptance of said policy with said statement 11 contained therein as hereinbefore set forth said John Noel ratified and confirmed the said false representations so made by him or on his behalf in applying for said policy.

By way of a fourth affirmative defense to plaintiff's complaint the defendant alleges:

1.

The defendant incorporates herein by this reference each, every and all of the allegations contained in its first affirmative defense.

2.

That in said policy of insurance numbered AX 463256, statement 11 thereof is as follows:

“Statement 11. The automobile described herein is paid for in full and is not mortgaged, except in the amount of \$740.00, which is payable in monthly installments, subject to the terms, conditions, limitations and agreements of this policy, if any, under section 1 of the Schedule of Perils is made payable to Auto Loan Company of Yakima, Wash., as their interest may appear.”

3

That the above statement was made by said John Noel to the defendant as an inducement for the issuance of said insurance policy and said statement written into said policy being the representation made by him to the defendant upon inquiry by the defendant as to the condition of the title to said property insured as to whether or not the same was mortgaged. [19]

4.

That in truth and in fact the truck described in said policy, to-wit, a 1928 White 5 ton Truck, S#132006, M.#GRB 1304, was not only mortgaged to the Yakima Auto Loan Company for the sum of \$740.00, but at the time of the issuance of said policy was also mortgaged by chattel mortgage to Frank Noel for the sum of \$8056.94, the said mort-

gage being dated January 3rd, 1929, and filed in the office of the County Auditor of Yakima County, Washington, on January 3rd, 1929, and being in force and unreleased and unsatisfied in the office of the County Auditor of Yakima County, Washington, from the date of the filing thereof, to-wit, January 3rd, 1929, until after the damage to said truck hereinbefore described, which occurred on June 26th, 1931, and that said mortgage was also recorded on September 11th, 1929, at page 86 of Book 58, Records of Chattel Mortgages of Umatilla County, Oregon, and remained unreleased and unsatisfied on the records of said Umatilla County, Oregon, at all times from the date of recording thereof until after the damage which resulted to said truck on June 26th, 1931.

5.

That the truth of said statement so made in the application of said John Noel for the policy issued thereon, was material to the issuance of said policy and without which the said policy would not have been issued, and that if the said John Noel had disclosed to the defendant the fact that the said property was also mortgaged to Frank Noel in the sum hereinbefore set forth or at all, the said policy would not have been issued to said assured, and that by reason of said misrepresentation on the part of said John Noel as to the condition of the title to said property, the defendant was deceived and was thereby fraudulently induced [20] to issue

said policy under conditions which affected the moral hazard thereof. That the defendant is advised and believes, and therefore alleges the fact to be that said John Noel made the false representation as to the condition of the title to said property with the intention to deceive the defendant and to mislead it in the issuance of said policy of insurance #AX 463256. That by the acceptance of said policy with said statement 11 contained therein as hereinbefore set forth said John Noel ratified and confirmed the said false representations so made by him or in his behalf in applying for said policy.

By way of a fifth affirmative defense to plaintiff's complaint the defendant alleges:

1.

The defendant incorporates herein by this reference all of the allegations, matters and things contained in its first affirmative defense.

2.

That in each, every and all of the policies of insurance herein referred to and described in said complaint, there is contained a statement numbered 10, as follows:

“Statement 10. No company has cancelled or refused to issue any automobile insurance policy of the assured during the last three years, except ‘No exceptions’.”

That the above statement was made in the application by said John Noel for the issuance of each

of said insurance policies and was the representation made by him or in his behalf as to the facts contained in said statement as to whether or not insurance on the property described in said policies had theretofore within three years been refused or cancelled.

3.

That the defendant is informed and believes, and there- [21] fore alleges the fact to be that each and every of the trucks described in the said policies, and each thereof, within three years prior to the issuance of the policies described in said complaint had been insured in another insurance company or in other insurance companies and that said insurance company or companies so insuring the said property had cancelled the insurance upon same or had refused to issue any automobile insurance policy or policies upon the said property during the said period.

4.

That the truth of said statement 10 so made in the application of said John Noel for the policies issued thereon was material to the issuance of said policies, and each of them, and without which neither of said policies would have been issued and that if the said John Noel had disclosed to the defendant the fact that said property had been insured within the period of three years prior to the application for said insurance and insurance there-

on had been refused by other companies or if the said John Noel had disclosed in said application to the defendant the fact that said property had been insured in another company or companies and such insurance had been cancelled as to any or either of said trucks during the said period, neither of said policies would have been issued to said assured. That by reason of said misrepresentations on the part of said John Noel and covered by said statement 10, as to the condition of previous insurance upon said trucks, and each thereof, the defendant was deceived and was thereby fraudulently induced to issue said policies, and each thereof, which affects the moral hazard thereof. That the defendant is advised, and believes, and therefore alleges the fact to be, that said John Noel made the said false representations as to prior insurance upon said trucks with the intention to [22] deceive the defendant and mislead it in the issuance of said policies of insurance and each thereof.

By way of a sixth affirmative defense to plaintiff's complaint the defendant alleges:

1.

The defendant incorporates herein by this reference all of the allegations, matters and things contained in its first affirmative defense.

2.

That in each and every of said policies of insurance statement 6 contains the description of the

automobile and equipment, and that in policy AX #463254, the said automobile insured under said policy is represented to be a 1928 model White 5 Ton Truck, S.#138992, M.#5687, 6 cylinders, actual cost to assured including equipment \$7,000.00, purchased new in August 27, which statement is not true in that the defendant is advised and therefore alleges the fact to be that the above described truck was a 1926 White 5 Ton Truck, purchased by the assured in 1927 at a price not to exceed \$5,000.00.

In policy AX #463255, the automobile thereby insured is described as a 1928 White 5 Ton Truck, S.#144846, M.#9381, 6 cylinders, actual cost to assured including equipment \$7,000.00, purchased new in August 27, which statement defendant is advised and therefore alleges *his* false and that in truth and in fact the automobile described in said policy was a 1927 White 5 ton truck purchased by the assured at a cost not to exceed \$4,660.00.

In policy AX 463256, the automobile insured thereby is described as a 1928 White 5 ton truck, S.#132006, M.# G.R.B. 1304, 6 cylinders, actual cost to assured including equipment \$7,000.00 purchased new by assured in August 27, which [23] statement defendant is advised and therefore alleges is false, and that in truth and in fact the automobile described in said policy was a 1926 White 5 Ton Truck, sold second hand to the assured in 1928 at a cost not to exceed \$2059.00.

3.

That the truth of the statements made in statement 6 of each of said policies, the same having been made in the applications of John Noel for said policies, and each thereof, was material to the issuance of said policies, and each of them, and without which neither of said policies would have been issued, and that if said John Noel had disclosed to the defendant the fact that the said automobiles were not 1928 models, but were 1926 and 1927 models as hereinbefore alleged, and had disclosed to the defendant the actual cost of said trucks to him, the defendant would not have issued the said policies or either thereof to said assured. That by reason of said misrepresentations on the part of said John Noel as hereinbefore alleged as to the year models and the cost to the assured of said trucks, and each thereof, the defendant was deceived and was thereby fraudulently induced to issue said policies, and each thereof. That the year model of said trucks affects the actual value thereof and the costs of said trucks respectively to the *assure* affect the hazard of the insurance thereon and are material to the undertaking of the defendant in the issuance of said policies. That the defendant is advised and believes, and therefore alleges the fact to be that said John Noel made the said false misrepresentations as to the year model of each of said trucks and as to the actual cost thereof to him as set forth in said policies, and each thereof, with the intention to deceive the de-

defendant and to mislead it in the issuance of said policies of insurance and each thereof. [24]

WHEREFORE, having fully answered plaintiff's complaint, the defendant demands that said action be dismissed and that it have judgment against said plaintiff for its costs and disbursements herein incurred.

D. V. MORTHLAND,
Attorney for Defendant.

State of Washington,
County of Yakima.—ss.

D. V. MORTHLAND, being first duly sworn, on oath deposes and says:

That he is the attorney for the defendant above named, and is authorized to verify the foregoing amended answer on behalf of said defendant, and in that behalf he incorporates herein all of the facts and allegations above stated in said amended answer and that same are true as he verily believes. That this verification is made by said attorney on the ground and for the reason that said defendant is a non-resident corporation of the State of Washington, duly authorized to engage in the automobile insurance business in said state.

D. V. MORTHLAND.

Subscribed and sworn to before me this 14th day of April, 1932.

[Seal] FLOYD FOSTER,
Notary Public for Washington, residing at
Yakima, Washington.

Service accepted and copy received this 14th day of April, 1932.

SNIVELY & BOUNDS,
Attorneys for Plaintiff.

[Endorsed]: Filed May 3, 1932. A. A. LaFramboise, Clerk. [25]

[Title of Court and Cause.]

REPLY TO DEFENDANT'S AMENDED
ANSWER.

Comes now the plaintiff in the above entitled action, and by way of reply to defendant's amended answer, admits, denies and alleges as follows, to wit:

1.

As to the allegations in paragraph one of the affirmative defense on page one, of defendant's amended answer, the plaintiff specifically denies that John Noel made any representations or statements of any kind to the representative or agent of the defendant company at its office in Spokane or to any one else acting for or on behalf of the defendants, or at all, and that no authorized agent or agents of the said John Noel made any representations or statements for and on behalf of the said John Noel or at all, to the defendant or to its representatives or agents in Spokane, or any where else.

2.

As to the allegations contained in paragraph two of the affirmative defense on page two of said amended answer, plaintiff is not sufficiently advised at this time to either affirm or deny the same, but does state and allege that the Insurance Policy speaks for itself and said policy is an exhibit in [26] said cause and is on file with the records in said action.

3.

Denies each and every allegation, matter and thing contained in paragraph three of defendant's first affirmative defense contained in said amended answer, on page two thereof, and the whole thereof, save and except that the said plaintiff admits that the road referred to in said paragraph three at the place where the accident took place was an extremely steep grade, but specifically denies that either of the said trucks or the said steam shovel were being towed at that time, but alleges that each of the said trucks, as well as the steam shovel, were being operated, prior to the accident, by and on their own power and plaintiff specifically denies that the said trucks or the said steam shovel were being towed at any time.

4.

Denies each and every allegation matter and thing contained in paragraph four of the first affirmative defense, which said paragraph four is on page two

and three, respectively, of the defendant's amended answer, and specifically denies that the effective cause of the said damage to the said trucks and steam shovel, was due to towing.

5.

As to the allegations contained in paragraph two of the second affirmative defense on page three of the defendant's amended answer, plaintiff at this time is not sufficiently advised as to the specific clause referred to in said paragraph two, but alleges that the policy speaks for itself, and this plaintiff at this time neither affirms or denies said paragraph two. [27]

6.

As to paragraph three of the second affirmative defense contained in said amended answer, on page three thereof, this plaintiff denies each and every allegation matter and thing therein contained, and the whole thereof, and specifically denies that John Noel made any representations or statements to the defendant as an inducement for the issuance of said insurance policy. That the said assured at no time, or in any way, made any representations to the defendant company or to any one acting for the defendant company with intent to defraud or deceive said defendant company.

7.

Denies each and every allegation matter and thing contained in paragraph four of the second affirma-

tive defense, on pages three and four of defendant's amended answer, and the whole thereof, save and except that the plaintiff admits that there was an instrument known as a mortgage on file in Yakima County, Washington and in Umatilla County, Oregon, upon the trucks in question, which was unreleased of record, but specifically denies that the said mortgage had not been paid and fully liquidated.

8.

Denies each and every allegation matter and thing contained in paragraph five of the second affirmative defense on page four of defendant's amended answer, and specifically denies that the assured made any representations or statements either to the defendant company or to any one acting for or on behalf of the defendant company, and specifically denies that the said assured did at any time make any statements or representations to the defendant company or any one acting for or on behalf of the said defendant company with intent to defraud or deceive the said defendant company.
[28]

9.

As to the allegations contained in paragraph two of the third affirmative defense on page five of the defendant's amended answer, the plaintiff is not fully advised as to the statement contained in the said paragraph two, so neither affirms nor denies

the same, but alleges that the instrument referred to in said paragraph, speaks for itself.

10.

Denies each and every allegation matter and thing contained in paragraph three of the said third affirmative defense, on page five of the said amended answer, and the whole thereof.

11.

Plaintiff denies each and every allegation matter and thing contained in paragraph four of the third affirmative defense on pages five and six of defendant's amended answer, and the whole thereof, save and except that the plaintiff admits that there was on file, both in the office of the County Auditor of Yakima County, Washington, and recorded in the Records of Chattel Mortgages in Umatilla County, Oregon, an unreleased mortgage on the three trucks in question, but specifically denies that the said mortgage in each instance, to wit; the one on file in Umatilla County, Oregon and the one on file in Yakima County, Washington, was unpaid. In other words, plaintiff states the fact to be that the said mortgage in each instance which was one and the same mortgage, was fully paid and this prior to the issuance of the three policies set forth in plaintiff's complaint.

12.

Denies each and every allegation matter and thing contained in paragraph five of the third

affirmative defense on page six of defendant's amended answer, and specifically [29] denies that the said assured at any time or in any way, to the defendant, or any one acting for the defendant, made false representations to them or it; or that the said assured authorized any one, at any time or in any way to make statements on his part or for him, that was intended to defraud or deceive the defendant.

13.

That the plaintiff is not presently advised as to the allegations contained in paragraph two of the fourth affirmative defense, on pages six and seven of the defendant's amended answer, so is not in a position to affirm or deny said allegations; but allege that the said instrument, which is marked as an exhibit and on file with the plaintiff's complaint in this case, speaks for itself.

14.

This plaintiff denies each and every allegation matter and thing contained in paragraph three of the fourth affirmative defense as set forth in said amended answer, on page seven thereof, and specifically denies that John Noel at any time, or in any way, or at all, made any statement or representation whatsoever to the defendant company.

15.

Denies each and every allegation matter and thing contained in paragraph four on page seven

of the plaintiff's fourth affirmative defense as set forth in its amended answer, and specifically denies that there was any mortgage other than the one referred to in the said policies on the said trucks, or the particular truck described in the said fourth affirmative defense that was unpaid, although this defendant states that it may have been that the said mortgage, at the time the insurance was issued, may have been unreleased of record. [30]

16.

Plaintiff denies each and every allegation matter and thing contained in paragraph five of the fourth affirmative defense, set forth on pages seven and eight of defendant's amended answer, and the whole thereof, and specifically denies that the said John Noel made any statements or representations whatsoever to the defendant company as alleged in said last referred to paragraph, and specifically denies that any representations were made by the said John Noel or any one for him, with intent to deceive said company.

17.

Denies each and every allegation matter and thing contained in paragraph two of the fifth affirmative defense, set forth on pages eight and nine of defendant's amended answer, and the whole thereof, and specifically denies that the assured made any statements or representations to the defendant com-

pany or any one for the company as alleged in paragraph two of the said fifth affirmative defense.

18.

Denies each and every allegation matter and thing contained in paragraph three of the fifth affirmative defense, on page nine of defendant's amended answer, and the whole thereof.

19.

Denies each and every allegation matter and thing contained in paragraph four of the fifth affirmative defense set out on pages nine and ten of defendant's amended answer, and the whole thereof.

20.

Denies each and every allegation matter and thing contained in paragraph two of the sixth affirmative defense set out on pages ten and eleven of defendant's amended answer, and [31] the whole thereof.

21.

Denies each and every allegation matter and thing contained in paragraph three of the sixth affirmative defense, set out on page eleven of defendant's amended answer, and the whole thereof.

As a further reply to said amended answer, and by way of an affirmative defense thereto; as to each of the alleged defenses set out in defendant's amended answer respectively, save and except the

allegations contained in the first affirmative defense, this plaintiff alleges:

1.

That subsequent to the 26th day of June, 1931, to wit: subsequent to the damage to the said three trucks, and the loss of the trucks, as described in plaintiff's complaint, and subsequent to the time the said company had notice of the damage and loss of the said trucks, the defendant company investigated the loss and damage to the trucks and visited the scene or place where the trucks were damaged, and consulted and advised with parties who were conversant with the facts surrounding both the issuance of the policies and loss under the policies, and advised with the assured and after said defendant company had investigated the damage and loss of the trucks in question and after the assured had given notice to the defendant company of his loss and demanded payment under the policies; the said defendant company issued and caused to be issued a notice wherein it declined liability and which said notice to the assured was upon the ground and by reason of the alleged towing, and not otherwise.

2.

That the notice and only notice received by the assured [32] or any one on behalf of the assured was the one just referred to in the preceding paragraph, and the same is in words and figures as follows, to wit:

“Main 5351

Max H. Wasson
Insurance Adjuster
Peyton Building
Spokane, Washington.

August 12, 1931.

Mr. John Noel
201—10th Avenue North
Yakima, Washington.

Dear Sir:

Your letter of August 6th, 1931 arrived during my absence from the city. I am just in receipt of advice from the Company calling my attention to the terms of the policy which provide that all collision coverage on these three policies are not applicable when the vehicle is being used for towing and I am therefore instructed to decline liability on all three policies.

I have not secured any more definite figures on the cost of repairing the trucks than the figure which was submitted by Mr. McCoy as it seemed to me that that was about the most fair figure that could be obtained. Several people have asked me about the sale of the salvage and I will be glad to have them get in touch with you if you decide you would rather sell the salvage than to pull them out of there and repair them.

Regretting the fact that the insurance was not in force at the time of the upset, I am,

Very truly yours,

MAX H. WASSON.

MHW:FC”

3.

That the said Max H. Wasson was a duly authorized and acting agent for the defendant company and was acting for and on behalf of the defendant company in declining liability.

4.

That the defendant company in declining liability, did so solely and entirely in virtue of the notice above set [33] forth and for the reason and on the alleged ground that the said trucks at the time and place set forth in plaintiff's complaint were being towed, thereby waiving any and all other defenses that the said defendant has or might have had, and that the said defendant is estopped from setting up and offering evidence in support of any and all other defenses, save and except that of towing.

Further replying to defendant's amended answer, and by way of an affirmative defense thereto, the plaintiff alleges:

1.

That the assured at or about the time the said policies were issued, caused to be paid to the defendant company, the sum of \$206.00 as the premium

in full upon the said policies so issued by the defendant company, and that at the time of the loss and damage to the property covered by the said three policies, there was a large part of the said premium that had been unearned by the defendant company, and that the said company at no time or at all has tendered back or offered to pay to the assured or this plaintiff or any one for the assured or for this plaintiff, any part of the unearned premium, but has retained and appropriated it, the unearned premium, to its own use, and still holds all of said premium for the benefit and use of the defendant, and so it is that the defendant is estopped from offering any evidence in support of any and all of the alleged affirmative defenses, respectively, going to the defeat of the plaintiff's right of recovery under the said three policies, respectively, and is estopped and has waived any right that the said defendant may or might have had from offering any evidence going to the reduction of the claim or in mitigation of the amount due the plaintiff under the said three policies. [34]

Wherefore plaintiff asks for judgment for which he prays in his original complaint; and that the defendant be estopped from offering any evidence whatsoever under any and all of the affirmative defenses set forth in his amended answer.

SNIVELY & BOUNDS,
Attorneys for Plaintiff. [35]

VERIFICATION.

State of Washington,
County of Yakima.—ss.

This day personally appeared before me, the undersigned Notary Public in and for said County and State Frank Noel, who, having first been duly sworn by me, upon oath deposes and says:

That he is the plaintiff named in the foregoing reply to defendant's amended answer, that he has heard the same read over, knows the contents thereof and that the same are true as he verily believes.

FRANK NOEL.

Subscribed and sworn to before me this 6th day of May, A. D. 1932.

[Seal]

I. J. BOUNDS,

Notary Public in and for the State of Washington, residing at Yakima, Washington.

Service accepted and copy received of the within reply this 7th day of May, 1932.

D. V. MORTHLAND,

Attorney for Defendant.

[Endorsed]: Filed May 9, 1932. A. A. Laframboise, Clerk. [36]

[Title of Court and Cause.]

VERDICT.

We, the jury in the above entitled cause, find for the plaintiff in the sum of \$7500.00.

H. C. TEMPLE,

Foreman.

[Endorsed]: Filed May 11, 1932. A. A. La-Framboise, Clerk. [37]

District Court of the United States, Eastern District
of Washington, Southern Division.

No. L-1681

FRANK NOEL,

Plaintiff,

vs.

UNIVERSAL AUTOMOBILE INSURANCE
COMPANY, a corporation,

Defendant.

JUDGMENT ON THE VERDICT.

The jury impanelled to try the above entitled cause in this Court, having on the 11th day of May, 1932, returned a verdict in favor of the plaintiff in words and figures as follows, to-wit:

“District Court of the United States, Eastern
District of Washington, Southern Division.

No. L-1681

Frank Noel,

Plaintiff,

vs.

Universal Automobile Insurance Company, a cor-
poration,

Defendant.

VERDICT.

We, the jury in the above entitled cause, find for
the plaintiff in the sum of \$7500.00.

H. C. TEMPLE,

Foreman.”

which verdict was ordered by the Court spread on
the records of said Court.

WHEREFORE, IT IS ORDERED, AD-
JUDGED and DECREED that FRANK NOEL,
do have and recover of and from the defendant
[38] UNIVERSAL AUTOMOBILE INSUR-
ANCE COMPANY, a corporation, judgment in
the sum of \$7500.00, together with plaintiff's costs
and disbursements in this action expended and
incurred taxed at \$76.20, together with interest on
each of said sums at the rate of 6% per annum
from the date hereof until paid.

Done in open Court this 16th day of May, 1932.

J. STANLEY WEBSTER,

Judge.

O. K. as to form.

D. V. M.,

Attorney for Defendant.

[Endorsed]: Filed May 16, 1932. A. A. La-Framboise, Clerk. [39]

[Title of Court and Cause.]

PETITION FOR EXTENSION OF TIME IN
WHICH TO SERVE PROPOSED BILL OF
EXCEPTIONS.

Comes now the defendant in the above entitled action by its attorneys of record and petitions the Court for an order extending the time for the preparation and service of a bill of exceptions in the above entitled action for the period of thirty days from this date, in order that sufficient time may be allowed for the transcription of stenographer's notes and proper preparation of the proposed bill of exceptions.

The verdict of the jury was rendered on the 11th day of May, 1932, and no extensions have heretofore been applied for or allowed.

Dated at Yakima, Washington, this 18th day of May, 1932.

D. V. MORTHLAND,

HAROLD A. SEERING,

Attorneys for the Defendant.

[Endorsed]: Filed May 18, 1932. A. A. La-Framboise, Clerk. [40]

[Title of Court and Cause.]

ORDER GRANTING EXTENSION OF TIME
IN WHICH TO PREPARE AND SERVE
A BILL OF EXCEPTIONS.

The above entitled action coming on regularly for hearing before the Court upon the petition of the defendant for an order extending the time and term in which a bill of exceptions may be prepared and served in said action, and it appearing to the Court that additional time should be given for the transcription of stenographer's notes and preparation of such bill of exceptions, and the Court being fully advised in the premises,

IT IS NOW THEREFORE HEREBY ORDERED that the time for the preparation and service of a bill of exceptions in the above entitled case be, and the same hereby is extended for the period of thirty days from the date of this order.

Done by order of the Court this 18th day of May, 1932.

J. STANLEY WEBSTER,
Judge.

[Endorsed]: Filed May 18, 1932. A. A. La-Framboise, Clerk. [41]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED, That on the 11th day of May, 1932, the above entitled action came on for trial in the above entitled Court, the Honorable J. Stanley Webster, District Judge, presiding, the same being tried before a jury, and certain proceedings were had, which are hereinafter set forth and which are presented in support of defendant's exceptions to the ruling of the Court in the course of the trial of said action, which exceptions are as follows:

(a) The defendant's exception to the ruling of the Court granting plaintiff's motion at the conclusion of all evidence in the case to withdraw from the consideration of the jury the evidence offered in support of defendant's first affirmative defense, to-wit, that the trucks and shovel were being towed within the provisions and meaning of the insurance policies admitted as and which are hereinafter referred to as exhibits in the case;

(b) To the Court's ruling denying the defendant's motion interposed at the close of all of the evidence of the case to withdraw from the consideration of the jury all evidence of the value of the trucks introduced by plaintiff on the ground that the valuation testified to by plaintiff's [42] witnesses as of January 1st, 1931, was not competent evidence to prove the value of the trucks at the time of the accident in June 1931;

which exceptions were duly saved as provided by law at the time of said ruling and which are hereinafter specifically set forth.

Defendant submits in support of said exceptions the following evidence admitted in the case:

After statement of plaintiff's counsel to the jury there was offered and received in evidence without objection three insurance policies described in the complaint and marked Exhibits "A", "B", and "C", and the assignment from John Noel to Frank Noel of the causes of action upon said policies, which was introduced as Exhibit "D."

JOHN NOEL

was called and sworn as a witness for the plaintiff and testified as follows:

Witness had lived in Yakima 30 or 31 years; was married, now living with his father at Yakima. Witness paid the premium on the policies in evidence and no part of the premium has been tendered, offered or paid back to witness or any one for him. The three trucks that were covered by the policies in evidence went over the bank and were wrecked. He was not near them but was at the scene of the accident from three to five minutes later. He had been there a short time before and went to move a car a few minutes before the accident. Witness saw the trucks within two weeks before the trial and had other parties there to see

(Testimony of John Noel.)

if there was any salvage and in the judgment of the witness there was no salvage. It would cost more to get the stuff out than it was worth. It was 57 miles from Pendleton, Oregon. The trucks are down a canyon two to three hundred feet below the road where they rolled or dropped down over a cliff. Witness [43] bought the trucks and was the owner of them at the time the policies were issued. They cost \$7,000.00 apiece and had been used three or four years. Two were bought in August, 1927, and the other was bought in 1926. The trucks were number 52 White trucks which are all sold by model number. The value of the trucks at the time the policies were issued was around \$5,000.00 apiece.

Witness received notice from the insurance company declining liability in the case (notice admitted in evidence as Plaintiff's Exhibit "E"). No part of the insurance has been paid or offered to witness, nor to any one for him. Witness has no interest in the claim now.

On

Cross-examination

witness stated that he was familiar with the trucks as the policy numbers applied to them. Witness referred to the bill of sale and stated that same referred to the truck having motor number 5687, and that the truck was purchased on conditional sales contract with another truck, which were purchased July 25th, 1927, and refers to policy (Ex-

(Testimony of John Noel.)

hibit "A") No. 463254. That witness bought the truck, engine No. 9381, also in 1927, covered by policy 463255. \$7,000.00 was paid for each of the trucks described and the price in the contract was for the chassis. Witness had memorandum relative to truck containing Motor No. GRB 1304 covered by policy number 463256, which was the same truck described in policy marked Exhibit "C." This truck was purchased in July or August, 1926. The truck was described in the policy as a 1928 truck. One truck was bought in 1926 and the other two in 1927. Paid around \$7,000.00 for that truck. Trucks were purchased on conditional sales contract and one of them had been repossessed and repurchased by witness under conditional sales contract admitted in evidence as Defendant's Exhibit 2. The trucks had been used in California hauling rock and dirt and were used from the middle of August to the [44] 1st of November in 1927 and 1928. They were used in the Naches Pass Highway, near Yakima, being used in road work in rock hauling. In the year 1928 were used up to the first part of November. Were brought to Yakima and not used in the winter. In the spring of 1930 they were on the Kittitas job. In 1929 they were used in digging a few basements and a little work on the South Naches River Road. They were used in the spring of 1930 on highway work on the Kittitas job. They were there used for two or two and a half months. They were then brought

(Testimony of John Noel.)

back to town and overhauled and the 12th of July witness left to go on the job in Oregon. Started work around the middle of August and they were used in road work from about the middle of August to the 19th of November. Had very little trouble with the trucks. Witness came back to Yakima and the trucks were left on the job in Oregon out in the open. Witness later went down to bring them out. At the time he talked to Mr. Doran about insurance, which Doran insisted upon having, did not know anything about the insurance except that witness held the policies. The trucks and equipment were equipped with hooks front and back for towing purposes. In June the witness started to bring out the equipment and was present when they started the trucks from the camp. The shovel was half a mile or three-quarters mile past the camp in the direction in which the equipment was being moved. It was 8 or 10 days from the time they left camp until they reached the foot of the grade where the accident happened being delayed on account of rain. They were bringing out a steam shovel, three White trucks, air compressor, one truck load of diesel oil and another truck with small stuff on. On the morning of the accident the trucks were taken up ahead of the shovel a couple of miles and parked there and the shovel was brought up later. [45] On the morning the trucks went over the road, they started from a block to two

(Testimony of John Noel.)

blocks from where the accident happened or probably a little farther, around a quarter of a mile.

The witness was not present when the accident happened. Was a quarter of a mile or a little farther away. He was with the shovel just before the accident happened, 15 or 20 minutes. When he got back the shovel was tipped over but there was a few minutes before it went down the cliff. He reached the place 4 or 5 minutes after the trucks went over.

Redirect Examination.

Bills of sale (Plaintiff's Exhibits "E" and "F") were admitted in evidence.

Witness stated that after he bought the chassis, the bare truck, he bought a spotlight, body, hoist, air and oil cleaner, and taking into consideration the extra equipment, the truck cost \$7,000.00. The body and hoist cost \$885.00. The air and oil cleaner cost \$34.00 and I paid freight on the body and hoist from Seattle to Buck's ranch in California. I forgot what that was and it cost me I think \$50.00 on each body and hoist to get it there. This equipment was all on at the time the trucks were insured.

On

Recross Examination

the witness stated that the additional equipment referred to was placed only on the first two trucks that were bought. The one bought in 1926 cost

(Testimony of John Noel.)

about \$3,000.00. They were stored in the Yakima Hardware warehouse. \$885.00 was paid for body and hoist and \$24.00 for permanent oil cleaner and \$50.00 extra expense in getting them there. There was a spotlight and I wasn't satisfied with the body as it came and I bought a big boiler plate in the bottom. I forgot what that cost. I remember the permanent oil job for \$24.00. I couldn't tell the amount of the other items. All this equipment was on the trucks at the time they went over the hill.
[46]

R. F. STARR,

called and sworn as a witness for the plaintiff, testified as follows:

Witness lives at Yakima, four years. Business, truck salesman for Bell-Wyman. Has handled for the past several years White Trucks and was familiar with Model 52. The White trucks are determined by model and Model 52 has been manufactured and sold over a period of four years and is still sold. Model 52 was a White 5 ton truck and in 1927 the chassis was built for approximately \$6,000.00, and with the equipment for road work was around \$7,000.00. Witness has seen these particular trucks at his father's place where he kept them, and saw them since when they were working on Naches Pass.

No cross-examination.

FRANK NOEL,

called and sworn as a witness for the plaintiff, testified as follows:

Witness is plaintiff in this case and the owner of the claim by assignment from his son. Neither the company nor any one for the company has offered or tendered the premium.

No cross-examination.

J. R. HICKEY,

called and sworn as a witness for the plaintiff, testified as follows:

Witness lives at Spokane, has been in the contracting business for last two years. Was with the three trucks in the care of John Noel when they were on the job for the period of three months. Witness was foreman on that job and trucks were handled under his directions. Witness took the trucks November 18th, 1930, when they stopped work, parked them all along the side of the camp, locked them up and raised the beds because the snow is deep. He jacked up the trucks and put blocks under them. The three trucks at the time the last work was done on that job were all in working condition and were working up to the time the snow chased [47] them out. Witness has worked along with White 52 trucks as foreman on the job and the trucks were in good serviceable condition.

(Testimony of J. R. Hickey.)

On

Cross-examination

witness stated that he directed the work of the trucks but did not repair same as they had a truck driver and mechanic. At times he paid attention to the repair work and at times he didn't. He was there when the trucks were to the side of the road and had some work done which was temporary repairs. The trucks were taken off the job for repairs at times the same as any other trucks. No, one of the trucks was not broken down most of the time. No work was done after November 18th.

Plaintiff Rests.

At this time D. V. MORTHLAND, counsel for defendant, stated on behalf of the defendant: We shall rely only upon our first affirmative defense in this action, the one in regard to towing, and desire to take the other affirmative defenses, numbers 2 to 6 inclusive, from the jury.

JUDGE.—Very well.

Mr. Morthland made his opening statement to the jury.

Mr. Bounds, for the plaintiff, moved the Court for a directed verdict in favor of the plaintiff for the reason that the insurance premium of \$205.00 had been paid to the company and that there was

no offer of payment or tender back of any unearned premium.

The motion was denied.

Thereupon

C. A. CASE,

was called and sworn as a witness for the defendant, and testified as follows:

Witness resides at Helix, Oregon, and in June, 1931, was employed by the Shell Oil Company. It was his business to drive back and forth on the North Fork of the John Day highway, that being the road upon which the upset occurred. He saw the equipment of John Noel being taken out of the place [48] where it had been working in Umatilla County, Oregon, along the John Day highway. Witness delivered oil and gas to the contractor's camp where the equipment had been working. Witness met Mr. Noel at the time and on the morning of June 26, 1931, witness was taking gas to Bowers & Bowers Camp on the North Fork of the John Day highway. Witness saw the equipment at that time starting up the John Day grade about a half or a quarter way up the grade. Witness had made arrangements with Mr. Noel the day before that he would wait at the place where the equipment had been parked that night so that witness could get back by him in the morning and they waited there until witness got back from

(Testimony of C. A. Case.)

Bowers & Bowers camp. When witness got back to the place where he had passed his equipment in the morning the equipment was then approximately six to eight hundred feet on up the grade from where he had passed it in the morning. He stopped the truck below them at the place where he had passed them that morning, and walked up the hill to the place reached by the equipment. He could see the equipment part of the way as he walked up the grade and as he was just coming up it was moving up the grade. When he got up there he saw the equipment moving for just a short ways. The trucks were tied or fastened together. There were three trucks, and were fastened or chained together. The trucks were chained to the shovel when the witness first came up. The trucks were in front of the shovel and up the hill and ahead of same. The trucks were on the traveled portion of the highway at that time and they were on the point of starting to work around the curve in the road and had made just a few feet. The trucks were all moving forward and the chains or cables were tied between the trucks and between the trucks and shovel and when witness reached the equipment it was stopped and they were fixing some piece of equipment. They were fixing the equipment for approximately [49] 30 minutes after witness got there, and the motor on the lead truck stopped. The driver was taking off the magneto to replace it. The chain from the third or rear truck was un-

(Testimony of C. A. Case.)

hooked from the shovel. It was a heavy log chain and attached to a tow hook on the truck. The trucks were all equipped with tow hooks. While they were working on the shovel the chain was unhooked from the truck and Mr. Noel hooked it on the truck while I was there and the shovel runner and oiler, or his assistant left the place. There were five men working with the outfit and when the caravan was moving up the hill. One was working upon each truck and the shovel runner and his assistant upon the ground. The shovel runner and his assistant left the place. They were instructed by Mr. Noel to go back and get a magneto. Of the other two men, the driver of the truck in the lead was working upon that and the other and myself started back to where my truck was parked. Mr. Noel started to his car, which was parked ahead, and no one was left but one of the drivers; known as Pete. The other driver went back with witness to his truck. When the truck driver and witness went back down the hill the engine on the truck which was driven by him was running and the engine on the shovel was running. Witness reached his truck. He ate lunch and when nearly through saw smoke from near the equipment. He could not see the equipment from where he was eating lunch. The equipment was left upon a steep grade. It was a narrow grade built upon the side of the mountain, probably ten feet wide, the outer edge had been cleared up where rocks filled in and

(Testimony of C. A. Case.)

would raise about 2000 feet in five miles of continuous grade. After witness saw the smoke he went back up the hill with the truck driver who had walked down with him and when they got to the place where the trucks had been left Mr. Noel and Pete were standing there. [50] The shovel was on fire, laying just below the grade where it had apparently just tipped over. Of the three trucks two of them at that time were down over the cliff and one was part way down. They were about 200 feet or more from the place where they had been standing on the road. As they came up Mr. Noel was inquiring from Pete what happened and Pete replied "I don't know." There was no other particular conversation relative to the equipment going over the cliff. Pete said he was standing upon the running board and front wheel when it went out from under him and left him on the ground.

On

Cross-examination

witness stated that the trucks and shovel were just moving into position on the grade when he first saw them about three feet. He had not passed them that morning as they were going up the grade. They were stopped when witness came along. He could not say that the trucks at any time were not on their own power. It was hard to determine that the trucks were towing one another and were towing or pulling the shovel. They were moving

(Testimony of C. A. Case.)

ahead as far as witness knows on their own power. When witness got up to the trucks and shovel, there were four employees and Mr. Noel. Witness knows the employees by sight. There were some one working under the steam shovel. There was a cable or chain between the steam shovel and the three trucks and the trucks next to them. It was fastened when witness noticed. It had to be unfastened so that the workmen could get under the shovel and it was fastened again. Witness did not go beyond the shovel. The three trucks were in front of the shovel. Witness did not know what was between them in looking up, but was guessing. Witness did not see the chains or cables between the trucks and did not go by the back truck or by the shovel.

[51]

Upon motion testimony of witness was stricken except as in so far that witness testified he saw the log chain fastened from the third truck to the steam shovel which followed. With that exception the testimony of witness with respect to the manner they were fastened, the towing or fastening is stricken from your consideration.

When witness left the steam shovel, Mr. Noel and Pete were there and Mr. Noel left about the same time, going up towards his car and witness went back. The witness' truck was about six or eight hundred feet from the steam shovel, and it was 10 or 15 minutes before witness saw the smoke. Wit-

(Testimony of C. A. Case.)

ness then walked back to the scene of the accident. The first thing that attracted the attention of witness was the shovel on fire over the grade. It was 10 or 12 feet below the road laying upon its side. After the fire had burned on it for quite a little bit, it went on down. It remained in its position on the side of the hill about five minutes. Witness did not see it go from the road down to its position off the road. Witness stayed a short time after the accident but did not see any chain or cable laying in the road but could not say it wasn't there. Witness did not look for the chain but would have noticed it if it were being picked up out of the road as witness passed by it after he got up there. The others went down to the cab. There was another car parked ahead.

On

Redirect Examination

witness stated that when the man was working under the shovel the chain was unhooked in front and after witness saw him working the chain was hooked up to the shovel again. Witness traveled over the road after the accident occurred about an hour or an hour and a quarter later. The side or part of the road where the trucks had gone over had broken off about the width of the tread of the equipment. Witness drove in towards the bank in order to get by [52] the place of the accident.

(Testimony of C. A. Case.)

On

Recross Examinaton

witness stated he saw Mr. Noel hook the chain between the truck and the steam shovel. He hooked it to the shovel by taking the chain up and putting it over the bar on the front end of the shovel over a projecting bar put there for that purpose. Witness was there at that time and all of the men were there.

JOHN NOEL

was called as an adverse witness for defendant and testified as follows:

The truck that had the diesel oil was parked about one block and a half from where the shovel was parked, and the other two trucks were kept at the camp, about three miles away. The shovel was a block or two above the bridge. The truck was started at the bridge and the other two trucks came up to get ahead of the shovel. All three trucks were ahead of the shovel. The truck with the fuel oil was hauled up ahead of the shovel. The truck at the bridge was in the middle, and one truck left at the camp was in front of the shovel. The trucks were fastened together with a chain or cable. The lead truck was fastened to the second truck with a long twisted cable. The front and rear truck hooked up were 30 to 40 feet apart. These trucks had

(Testimony of John Noel.)

hooks at each end for towing. They are put in front and rear for pulling when one truck is stuck. They had a cable between the first and second truck when we started out that morning and a big chain between the second and third truck was fastened to the trucks by means of hooks. And between the third truck and shovel he had a big heavy log chain. And when they started up the grade that morning the equipment was fastened together in the manner just described and they continued to have them fastened together in that manner until they got to the place where they had difficulty in getting around a rocky corner and stopped. At this time they stopped near the place where the upset occurred. The last truck and second truck were hooked together, the [53] first truck and the second truck had that big twisted cable, and witness did not know how long it had been undone but when he got to the front truck that cable had come loose at the front truck and was twisted in a big kink in a big pile in front of the second truck. It was an old rusty, twisted cable. The trucks were cabled together for trouble and to use precaution for moving up the big hill. Were trying safety first. It was a narrow road and if one truck went down a little then the other trucks would have held it on. If the shovel slipped down over the bank they expected to hold it and if one truck slipped down one side witness would expect the other trucks to hold it. There had been some trouble

(Testimony of John Noel.)

with the gears slipping in the shovel a few days ago. The gears would slip and they had trouble with the links on the caterpillar part of the shovel. The shovel was a caterpillar tractor with a shovel, cab, boiler and bucket placed on top of it, and the caterpillar carried it about, moving it in place on its own power. The caterpillar part carried the other equipment. They had trouble with the links on the caterpillar after they got going on the highway. The road was muddy and snapped off a few of the links and witness had a couple put on which he had brought that morning from Pendleton. The shovel and tractor weighed about 42 to 45 tons. The proof was put into the insurance company in which witness made the statement that when the trucks were pulling all three trucks were running and the shovel was also running on its own power so that they would act as an anchor in case the shovel should go backwards, or in case something should break and at the same time they would help the shovel up the grade and it would help us to make better time. Witness stated that he did not say anything about making better time but that the signature on the typewritten statement was [54] his signature. Witness told the adjuster that the trucks were fastened together during the time they were pulling up the grade that morning and that the trucks would act as an anchor if they went down but was positive he did not tell him that they would help the shovel make better time going up

(Testimony of John Noel.)

the grade. The witness remembered speaking about the shovel slipping off the grade and that must have been the grade where it was wrecked. The shovel had been slipping when they were bringing it out as they had had a good deal of rain. The trucks had not been towing it at that time nor did the trucks help it out of any place. It was found necessary to have the trucks hooked on ahead to help in case anything happened. Witness was present at the place where the upset had occurred but had left the shovel and had gone up to his car and only Mr. Briere was left at the place when he went up to his car. He was working under the hood trying to take a cap or bolt off under the magneto on the front truck. Don Stroupe, Mr. Case and witness were near the shovel when witness left to go up to his car and they started out together. They went one way and witness went the other. At that time the engine on the shovel was running and the motor on the lead truck was running, though witness was not sure. Could not say for sure whether the motor on the third or rear truck was running at that time. Witness did not hear any noise while he was up at his car and was not able to see the caravan of trucks when he was at his car. He was there five or six minutes and had walked all the way back and was where the trucks were before he noticed they were gone. The road was 9 or 10 feet wide and he walked down from the car about a quarter of a mile. He did not see that the

(Testimony of John Noel.)

trucks were gone till he was standing right about where the trucks were standing when he left. There wasn't anybody [55] there at that time. Witness jumped to the side of the road. He thought Mr. Briere had gone down the bank. Briere had stepped over the side of the bank to see where the trucks were gone. At that time the shovel was half in the road and the outside truck had slipped off, leaning pretty well out.

Mr. Case and Don Stroup were walking up the road and witness was walking down in the road, down to the shovel, and they were coming back up.

On

Cross-examination

witness stated that the road from the shovel up to where he parked his car, veered around and he could not see where it ran. The trucks were hooked together in case of an emergency. The shovel had no brake on it. It is held by gears and as long as it is geared you don't need any blocks under it and if it is not geared you would need blocks. He had hooked the trucks and shovel together about 200 feet from where the accident happened and they had been hooked together for that distance. The trucks and shovel were all on their own power. That is one wasn't pulling the other at any time. Pete was working on the front truck. He never did go back to the shovel. The front truck was not hooked to the second. The rear truck was

(Testimony of John Noel.)

hooked to the shovel. Witness tried to move the chain hooked between the rear truck and shovel. It was hooked round the shovel with an eye on one hook and a guy above on the other. He hooked the chain between the frame of the shovel and placed through the eye and hook on the back of the rear truck. When one of the shovel runners tried to get under there this big log chain was in his way and I tried to move it around and Joe Brinier came up and picked it up and unhooked it and threw it to the side and it landed over to the side of the road and was not touched. When I got back the cable had [56] come off the front and was on the side of the road. The chain was where Joe had thrown it along side of the road. The signature to the written statement is my signature signed at the Benjamin Franklin Hotel in Seattle in the presence of my wife and Mr. Wasson, the adjuster. He had met Mr. Wasson the night before at eight o'clock at the Benjamin Franklin Hotel and was with him until six or seven the next morning. Mr. Wasson furnished liquor and we were all drinking. We drank two quarts and went downstairs to another room and drank in some one else's room. Mr. Wasson was with him and witness had not been to bed before signing the statement. Mr. Wasson wrote the statement in pencil first. Witness had not seen the statement since until today.

(Testimony of John Noel.)

On

Redirect Examination

the witness stated that he read the statement over before he signed it and was part sober anyway when the typewritten statement was made out. He thought he knew what he was doing and he and his wife both read the statement over but did not talk about the various things in the statement, did not object to any part of it and never struck any of it out. In the statement made to Mr. Wasson gave the complete history of his contract and told the adjuster how he was bringing the equipment out just like he stated in his testimony but did not tell Mr. Wasson about helping the shovel up the hill and nothing was mentioned at that time. Witness stated that he would say that that part had been wrote over. Witness did not have a copy of it nor had he asked for a copy of it.

JOE BRINIER,

called and sworn as a witness on behalf of the defendant, testified as follows:

Witness lives at Blewitt Pass. In June, 1931, he was working for Noel helping to get the equipment out. Witness was oiler on the shovel and working around helping to get the equipment out. When they started in with the shovel on the [57] day the accident happened they started a couple hundred

(Testimony of Joe Brinier.)

feet from where the bridge was. The front truck was hooked to the second, the second with the old compressor was hooked to the third and the third to the shovel with the cable, twisted and all kinked up. An eye had been made to use between the first two trucks. The distance between the trucks was 30 to 35 feet. The second truck was fastened to the third truck with a heavy log chain and there was about 20 feet between them. The third truck was fastened to the shovel about 20 feet. When they started out that morning the trucks and shovel were fastened together in the manner described with the cable and chains. They had not been fastened together during the whole time they were traveling with it that morning but just before they got to the steep part and from where they were parked had probably gone two or three hundred feet hooked together with the cable and chains. They continued to be chained and cabled together for about 300 feet. The road was steep and rocky on the right hand side of the shovel and the rod stuck out and hit that rock and bent and it couldn't steer and we re-sawed back and forth a little bit. He unhooked the shovel and trucks because with that bent bar he couldn't steer. He had to get the chain out of the way before he could turn the shovel in any way. They were just about around the point when the front truck stopped, magneto dead and was moving the second truck on ahead but the second truck was pretty close and we parked and let it set and went

(Testimony of Joe Brinier.)

back and got the magneto. There would hardly be room to work by over the steep bank. The front truck was right in the road, they were all in the road because they couldn't get anywhere one side was rocky and steep cliff. The other two trucks were running up close to the front truck and let them coast back again and stop about [58] 20 or 25 feet from the front one and noticed the old kinky cable had come loose and was twisted up in front of the second truck. Witness stated he did not know when the cable came loose. The old kinky cable was laying there. It came loose a couple of times before that. Witness went back to help the shovel runner and was stopped there for an hour. They were trying to get the rod back. After that the shovel runner and witness went back to get a magneto at the camp. John Noel and Pete Briere were left at the trucks. Don was there and Mr. Case of the Shell Oil Company. Witness and shovel runner went away first. They were away probably half or three-quarters of an hour and came back. When they got back with the magneto they saw smoke a little ways before they got there and met Johnny and the Shell man and Don Stroup when back down the road aways, and was told what happened. They didn't seem to know just what did happen. They were all excited and could hardly talk. The shovel and everything was down at the bottom of the hill when witness got back. The trucks were running in low gear in climbing the

(Testimony of Joe Brinier.)

hill. The shovel is geared much lower than the trucks and there was no comparison with the pulling. The trucks went ahead, worked around, and left slack between them in case something went wrong with the shovel. "We would go a ways and it would tighten and we would give hand signals—the shovel behind so there was no use of pulling because one pulled against the other." Every once in a while they would have to stop. If the shovel had slid or any of the trucks had slid one could help the other.

On

Cross-examination

the witness stated the trucks and shovel were fastened together in case something should go wrong with the shovel. That was to hold the steam shovel so it could be blocked. The trucks and shovel were on their [59] own power, and there was no time the trucks and steam shovel were not travelling on their own power. Witness unhooked the chain between the last truck and the shovel and threw it out of the way, and it laid there all of the time. It was at the shovel after the accident. Witness had not worked for Mr. Noel at any time after the accident. The cable was laying in the road and was still there. It did not go down to the trucks.

J. B. JONES,

called and sworn as a witness for the defendant, testified as follows:

Witness lives at Portland, Oregon, and is in the truck business. Witness is familiar with White trucks and has used them three years. Has bought and sold used White trucks. He saw the trucks that went over the grade on the John Day highway in Umatilla County, Oregon, a short time after they went over the grade. He went down to where the trucks were. Witness is acquainted with the value of salvage of trucks of this kind that have been in a wreck. That the trucks in the position in which they were in, were worth \$100.00 each. There were three trucks. Witness was familiar with used 52 White trucks in the Eastern part of Oregon on June 26, 1931, the same being 1926 and 1927 White trucks used in general road work during the seasons 1927, 1928, 1929 and 1930, in good mechanical condition and stated that just prior to this accident these trucks were worth \$2,000 each.

On

Cross-examination

witness testified that he had not seen these particular trucks prior to the accident. He saw the equipment there at the time he examined them. He did not know what equipment had been put on the trucks. He didn't know of any White 52 trucks sold in Oregon in the spring of 1931.

CHARLES C. PELTON

was called and sworn as a witness [60] for the defendant, and testified as follows:

Witness lives in Vancouver, Washington, is a truck salesman, selling White and Indiana trucks. Has been in the business since 1920 and is familiar with White No. 52. His territory is 16 counties in Oregon, including Umatilla County, where the accident occurred. He saw the trucks on a Sunday in July after the accident happened and went down the hill where the trucks were. Witness is familiar with salvage value of trucks and estimated the value of these trucks at the place where they lay at \$50.00 apiece. Witness states that if the trucks were in good mechanical condition he could sell them for about \$2700.00 each, but that he could not give an accurate answer as to their fair market value in Umatilla County, Oregon, at the time of the accident without having seen the trucks before the accident.

Defendant Rests.

Thereupon the plaintiff moved the Court that every question be taken from the jury save and except that of the value of the three trucks, and that the defendant's first affirmative defense be withdrawn from the consideration of the jury.

The motion was granted, to which defendant excepted and its exception was allowed.

Thereupon the defendant moved the Court for an instruction to the jury submitting same solely upon the evidence of defendant's witnesses as to the value of the trucks at the time of the accident, the measure of damages being the difference between the fair market value of the trucks at the time and place of the accident, before same occurred, and immediately after the accident occurred, and that the jury be instructed to disregard the testimony of John Noel, the only witness who testified on the question of value for the [61] plaintiff herein. He stated that at the time the policies were issued the trucks were worth \$5,000.00 each. On the ground that said evidence is not competent under the law fixing the measure of damages and that the time of such valuation was too remote.

The defendant's motion was denied, to which defendant excepted and its exception was allowed.

[62]

I, J. Stanley Webster, Judge of the above entitled Court, and the Judge before whom the above entitled cause was tried, do hereby certify that the matters and proceedings embodied in the foregoing Bill of Exceptions are matters and proceedings occurring in said cause and the same are hereby made a part of the record herein.

I do further certify that the same contains all of the material facts, matters and proceedings heretofore occurring in said cause and not already a part of the record herein pertaining to the defendant's exceptions taken and allowed at the same trial.

I do further certify that Plaintiff's Exhibits "A," "B," "C," "D," "E" and "F" and Defendant's Exhibits 1 and 2 are the only exhibits received in evidence on the trial of the above named cause which pertain to the exceptions taken by said defendant.

Done in open Court, this 14th day of July, 1932.

J. STANLEY WEBSTER,

District Judge. [63]

ACCEPTANCE OF SERVICE.

Service of defendant's bill of exceptions accepted and copy thereof received this 13th day of July, 1932.

SNIVELY & BOUNDS,

Attorneys for Plaintiff.

[Endorsed]: Filed July 14, 1932. A. A. LaFramboise, Clerk. [64]

[Title of Court and Cause.]

MOTION FOR NEW TRIAL.

Comes now the defendant in the above entitled action and moves the Court for an order granting

it a new trial therein on the ground and for the reason:

A. Insufficiency of the evidence to justify the verdict.

The above is based upon the failure of the jury to allow a deduction of \$100.00 in the recovery on each policy in view of the fact that the policies were "100.00 deductible" policies.

Said motion is also based upon the fact that the only evidence of the value of the trucks at the time of the accident was given by witness of the defendant, who placed their value at \$2,000.00.

That in view of the above two errors the jury allowed \$600.00 on each truck in excess of their value as disclosed by the only competent evidence in the case.

B. Error in law occurring at the trial.

The foregoing claim of error is based upon:

1. The ruling of the Court on plaintiff's motion to withdraw from the consideration of the jury the evidence pertaining to defendant's first affirmative defense, to-wit, that the trucks and shovel were being towed within the proper meaning of the policies, and [65]

2. The Court's denial of defendant's motion to withdraw from the consideration of the jury all evidence of the value of the trucks introduced by plaintiff on the ground that the valuation testified to by Mr. Noel as of January 1st, 1931, was not

competent evidence to prove the value of the trucks at the time of the accident on June 26, 1931; that is, the case should have been submitted to the jury on the question of valuation solely upon the testimony of the witness J. B. Jones that the trucks were worth \$2,000.00 each and the salvage \$100.00 each.

Dated at Yakima, Washington, this 11th day of June, 1932.

D. V. MORTHLAND,
HAROLD A. SEERING,
Attorneys for Defendants.

Service of a copy hereof admitted this 15th day of June, 1932.

SNIVELY & BOUNDS,
Attorneys for Plaintiff.

[Endorsed]: Filed Jun. 13, 1932. A. A. LaFramboise, Clerk. [66]

[Title of Court and Cause.]

ORDER DENYING DEFENDANT'S MOTION
FOR A NEW TRIAL.

The above entitled action coming on regularly for hearing before the above entitled Court and the Honorable J. Stanley Webster presiding, upon defendant's motion for a new trial, and the matter being argued to the Court by counsel for the respective parties, and the matter being duly and finally submitted, and the Court being fully ad-

vised in the premises, denies each and every part of said motion and the whole thereof, and the same is so ordered, to all of which the defendant excepts and an exception is allowed.

Done in open Court this 14th day of October, 1932.

J. STANLEY WEBSTER,
Judge.

Form O. K.

D. V. Morthland.

[Endorsed]: Filed Oct. 14, 1932. A. A. LaFramboise, Clerk. [67]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable J. Stanley Webster, Judge of the District Court:

Universal Automobile Insurance Company, your petitioner, who is the defendant in the above cause, prays that it may be permitted to take an appeal from the judgment entered in the above cause on the 16th day of May, 1932, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith.

And your petitioner desires that said appeal shall operate as a supersedeas (the judgment in said case having been entered for the sum of \$7,500.00), and therefore prays that an order be made fixing the

amount of the security which said defendant shall give and furnish upon such appeal, and that upon giving such security all further proceedings in this Court be suspended and stayed until the determination of said appeal by the Circuit Court of Appeals.

Dated the 26th day of October, 1932.

D. V. MORTHLAND,
HAROLD A. SEERING,
Attorneys for the Defendant.

[Endorsed]: Filed Oct. 26, 1932. A. A. LaFramboise, Clerk. [68]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the defendant in the above entitled cause and files the following assignment of errors upon which it will rely in the prosecution of the appeal herewith petitioned for in said cause from the judgment of this Court entered on the 16th day of May, 1932;

1.

The Court erred in granting plaintiff's motion at the conclusion of all of the evidence in the case to withdraw from the consideration of the jury the evidence offered in support of defendant's first affirmative defense, to-wit, that the trucks and shovel were being towed within the provisions and meaning of the insurance policies admitted as evi-

dence in the case and marked Exhibits "A," "B" and "C."

2.

The Court erred in denying defendant's motion interposed at the close of all evidence in the case to withdraw from the consideration of the jury all testimony as to the value of the trucks introduced by plaintiff on the ground that the valuations testified to by plaintiff's witnesses were not competent to prove the value of the trucks at the time of the damage thereto on June 26th, 1931, and that said evidence was based upon an incorrect rule of damages. [69]

Wherefore, defendant prays that the said judgment may be reversed and for such other and further relief as to the Court may seem just and proper.

Dated at Yakima, Washington, this 26th day of October, 1932.

D. V. MORTHLAND,
HAROLD A. SEERING,
Attorneys for Defendant.

[Endorsed]: Filed Oct. 26, 1932. A. A. LaFramboise, Clerk. [70]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL, WITH
SUPERSEDEAS.

The petition of the Universal Automobile Insurance Company, a corporation, defendant in the above entitled cause, for an appeal from the final judgment, is hereby granted and the appeal is allowed; and upon petitioner filing a bond in the sum of \$9000.00 with sufficient sureties, and conditioned as required by law, the same shall operate as a supersedeas of the judgment made and entered in the above cause, and shall suspend and stay all further proceedings in this Court until the termination of said appeal by the Circuit Court of Appeals of the Ninth Circuit.

Dated this 27th day of October, 1932.

J. STANLEY WEBSTER,
District Judge.

[Endorsed]: Filed Oct. 27, 1932. A. A. LaFramboise, Clerk. [71]

[Title of Court and Cause.]

SUPERSEDEAS AND COST BOND.

KNOW ALL MEN BY THESE PRESENTS:

That we, UNIVERSAL AUTOMOBILE INSURANCE COMPANY, a corporation, as principal, and UNION INDEMNITY COMPANY, a corporation of the State of Louisiana, and duly authorized to write surety bonds in the State of Wash-

ington, as Surety, are held and firmly bound unto Frank Noel, appellee in the above entitled action, in the full and just sum of Nine Thousand Dollars (\$9,000.00) to be paid to the said appellee, his heirs, executors, administrators, successors or assigns, to which payment, well and truly to be made, we bind ourselves and our successors, jointly and severally by these presents.

SEALED with our seals and dated this 3 day of November, 1932.

WHEREAS, lately at the May term of the United States District Court in and for the Eastern District of Washington, Southern Division, holding Court at Yakima, Washington, in a suit depending in said Court between Frank Noel, plaintiff and Universal Automobile Insurance Company, a corporation, defendant, a judgment was rendered against the said defendant at the said term of Court and the said defendant [72] has petitioned for and been allowed by the Judge of said Court an appeal to the United States Circuit Court of Appeals of the Ninth Circuit, and citation has been issued directed to said Frank Noel, as appellee, citing him to appear in the said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty (30) days from and after the date of such citation;

NOW, THE CONDITION OF THE ABOVE OBLIGATION is such that if the said Universal Automobile Insurance Company, a corporation,

shall prosecute said appeal to effect, and answer all damages and costs if it fails to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

UNIVERSAL AUTOMOBILE
INSURANCE COMPANY,

By WM. H. MARKS,

Attorney in Fact,

Principal.

UNION INDEMNITY COMPANY,

By W. E. HANEY,

W. H. HANEY,

Attorney-in-Fact,

Surety.

Countersigned:

.....
Resident Agent.

The within and foregoing bond is approved this 10th day of November, 1932.

J. STANLEY WEBSTER,

Judge of the United States District Court for the Eastern District of Washington, Southern Division. [73]

State of California,

City and County of San Francisco.—ss.

On this 3 day of November, in the year One Thousand Nine Hundred and 32, before me, Emily K. McCorry, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, per-

records of your office pertaining to the above entitled cause, including the following:

Original summons and complaint;

Petition for removal to United States District Court for the Eastern District of Washington, Southern Division;

Bond in support of petition for removal of cause from the Superior Court to the United States District Court;

Notice of filing petition for removal from the Superior Court of Yakima County, Washington, to the United States District Court, together with proof of service thereof;

Order for removal of cause from Superior Court to the United States District Court;

Notice of removal of cause from Superior Court to the United States District Court, together with proof of service thereof;

Amended answer of defendant filed in said cause in the United States District Court, Eastern District of Washington, Southern Division;

Reply to defendant's amended answer;

Exhibits "A," "B," and "C" (note: original exhibits to be sent up, consisting of 3 insurance policies);

Verdict of the jury rendered in said action;

Judgment on the verdict of the jury rendered in said action;

Petition for extension of time in which to serve proposed bill of exceptions;

Order granting extension of time in which to prepare and serve bill of exceptions, together with proof of service and certificate of Court;

Bill of exceptions and certificate settling same;

Motion for new trial and proof of service;

Order denying motion for new trial;

Petition for appeal; [75]

Assignment of errors;

Order allowing appeal with supersedeas;

Citation on appeal together with proof of service of same;

Supersedeas and cost bond on appeal together with proof of service of same;

Praecipe and proof of service of same.

D. V. MORTHLAND,
HAROLD A. SEERING,
Attorneys for Defendant.

Service of the foregoing Praecipe accepted and copy thereof received this 9th day of November, 1932.

SNIVELY & BOUNDS,
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 10, 1932. A. A. La-Framboise, Clerk. [76]

[Title of Court and Cause.]

CITATION ON APPEAL.

The United States of America.—ss.

To Frank Noel, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to an order allowing an appeal from the District Court of the United States for the Eastern District of Washington, Southern Division, in a suit wherein Universal Automobile Insurance Company, a corporation, is appellant, and you are appellee, to show cause, if any there be, why the judgment rendered against said Universal Automobile Insurance Company, a corporation, should not be corrected and why speedy justice should not be done to the parties on that behalf.

Given under my hand at the City of Spokane, in the Eastern District of Washington, this 27th day of October, 1932.

[Seal]

J. STANLEY WEBSTER,

Judge of the District Court for the Eastern District of Washington, Southern Division.

Service of a copy of the foregoing citation is acknowledged this 28th day of October, 1932.

SNIVELY & BOUNDS,

Counsel for Appellee.

[Endorsed]: Filed Oct. 27, 1932. A. A. LaFramboise, Clerk.

[Title of Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD.

United States of America,
Eastern District of Washington.—ss.

I, A. A. LaFramboise, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify that the foregoing typewritten pages, numbered 1 to 76 inclusive, to be a full, true, correct and complete copy of so much of the record, papers and all other proceedings in the above entitled cause as are necessary to the hearing of the appeal therein, in the United States Circuit Court of Appeals, as called for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal from the judgment of the District Court of the United States for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California.

I do further certify that I hereto attach and herewith transmit the original citation issued in this cause.

I do further certify that the fees of the clerk of this Court for preparing and certifying the foregoing typewritten record amount to the sum of \$21.20 and that the same have been paid in full by Mr. D. V. Morthland, attorney for defendant.

